SUPREME COURT, U. S.

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No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICO DI PIETTO, ERNEST INFELICE, JAMES MIRRO, FRANK SANTUCCI and ROBERT J. McDONNELL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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On Saturday, September 28, 1968, the Petitioners received a copy of the Supplemental Memorandum for the United States. The Memorandum admits to "unlawful electronic surveillance" of Petitioners Mirro and McDonnell by Federal Agents, asserting that the overheard conversations were "unrelated" to the case at bar. Nevertheless, the Solicitor General asks that this Court rule on the

Petition for a Writ of Certiorari to the Seventh Circuit in respect of the questions which it presents, without prejudice to a proceeding before the District Court in accordance with the procedure prescribed in *Alderman* v. *United States,* No. 133.

The Solicitor states that he intends to make a disclosure to the district court in accordance with the procedure which this Court prescribes in *Alderman* v. *United States,* No. 133, this Term. This action by the Solicitor is, of course, dependent on the success of his motion to modify. In the instant case, the Solicitor has again made an *ex parte* determination of the relevancy of the overhead conversations. In *Alderman,* this Court stated:

> "We read the response as admitting that Alderisio's conversations were overheard by unlawful electronic eavesdropping but as justifying nondisclosure on the basis of the Department's determination that the information obtained was not arguably relevant to this prosecution. We cannot accept the Department's ex parte determination of relevancy in lieu of such determination in an adversary proceeding in the District Court. Accordingly we grant the petition for certiorari as to each of the petitioners Alderisio and Alderman, vacate the judgment of the Court of Appeals, and remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance of these convictions of any conversations . . . ."

The procedure suggested by the Solicitor, *i.e.,* denial of the petition for certiorari and subsequent disclosure to the district court is completely contrary to the well-established procedure of this Court. See *Black* v. *United States,* 385 U.S. 26, *Hoffa* v. *United States,* 387 U.S. 231, *O'Brien* v. *United States,* 386 U.S. 345, *Schipani* v. *United States,* 385 U.S. 372, and *Granello* v. *United States,* 386 U.S. 345.

The Solicitor suggests in his Memorandum for *Scandifia* v. *United States,* No. 54, this Term, that the district court would have jurisdiction to hear this matter without granting of the petition for certiorari and remand for hearing on the theory that the illegal electronic eavesdropping is "newly discovered evidence." We submit that a contrary conclusion is inescapable. This is not evidence that is newly discovered but is evidence "newly divulged" by the Solicitor, which, we submit, the Department of Justice was under a continuing duty to divulge at all stages of this prosecution. See *Brady* v. *Maryland,* 373 U.S. 83.

The indictment was returned on December 8, 1965, and related to matters which allegedly occurred on May 25, 1961. The period of electronic surveillance suggested by the Solicitor General in 1964 was a critical period when the investigation in this matter was apparently under way; it certainly had not been concluded.

The Supplemental Memorandum, however, states that "each of them was separately overheard discussing matters unrelated to this case, etc." Quite aside from the unilateral determination of "unrelated", the Petitioners wish to bring to the Court's attention matters which have recently arisen in the United States District Court for the Northern District of Illinois.

In two cases, *United States* v. *Fidanzi,* No. 67 CR 561 and *Angelini* v. *Illinois Bell Telephone Co.,* No. 68 C 612, it was revealed that the Federal Bureau of Investigation maintains what are called "index cards". In the course of electronic surveillance in Chicago, Illinois, it appears that every time a person's name is mentioned in any electronic surveillance, an index card is prepared for that particular individual. Even if he is not a participant in a conversation, when other persons discuss his activities, the particular tape, record or log and the date thereof is

registered on the "index card". For example, in the case of Donald Angelini, the F.B.I. admitted to five entries on the index card in which Angelini was either overheard *or* discussed. It was further admitted that these cards involved three separate and distinct places where electronic surveillances were being conducted.

In *United States* v. *Fidanzi,* four logs were produced, in one of which Fidanzi was a participant in the overheard conversations, and in three of which he was the subject of conversations between other persons. Interestingly enough, all four conversations were the result of electronic surveillance (by trespass) in an office where, apparently, the surveillance was aimed at Phil Alderisio, who is a Petitioner in a matter now pending before this Court, in *Alderisio* v. *United States,* No. 133.[1]

These Petitioners respectfully urge this Court to remand this case back to the District Court for a full inquiry into the extent, not only of the direct electronic surveillance in which the Petitioners Mirro and McDonnell were participants, where their actual conversations were overheard, but also to determine whether or not any "leads" or any investigation information relative to this case were gained through the conversations of *other* persons discussing the affairs of the Petitioners Mirro and McDonnell. Indirect eavesdropping can be just as violative as direct.

In the light of the government's admission here, Petitioners express an additional concern. In the testimony of F.B.I. Agent Robert E. Malone in *United States* v. *Fidanzi,*

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[1] The trial court in *Fidanzi* refused to make an *in camera* inspection pending this Court's decision in *Kolod* v. *United States,* No. 133. The Government then produced logs for defense inspection, under a protective order barring defense counsel (over objection) from revealing the contents of the logs of eavesdropping of Alderisio and Fidanzi, and Alderisio and others concerning activities of Fidanzi. *Fidanzi* is presently on appeal.

Malone stated that not all of the logs were forwarded to Washington, D.C. The eleventh hour admissions of the Respondent of violations of Federal law, bespeaks a failure of communication between local officers of the Federal Bureau of Investigation and its national office. It is the Petitioners' respectful submission that only an adversary inquiry in the particular district where the offenses by a federal agency occurred will satisfy the question of whether or not all material thus unlawfully obtained is being made available to Petitioners or persons aggrieved as a result of electronic eavesdropping.

The Petitioners therefore, respectfully pray that this Court remand this cause to the District Court for full hearings on the nature and extent of the electronic surveillance.

Respectfully submitted,

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